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CIVIL & CRIMINAL PROCEDURE

/ OF

JEWISH COURTS

BY

Rabbi Meyer Waxman.



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NEW YORK

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CIVIL AND CRIMINAL PROCEDURE OF JEWISH COURTS*

BY RABBI MEYER WAXMAN

INTRODUCTION

DEFINITION AND NATURE OF PROCEDURE

PROCEDURE is that part of law which comprises a series of rules and regulations, by means of which the rights guaranteed by society to its members are reassured by the individuals, or the wrongs committed by them punished. In the first case, the procedure is civil; in the second, criminal. In both cases it implies a controversy. In the former, the contending parties are individuals, while the state, or the moral and religious power expressed in the judge, is called in as an arbitrator and exponent of the right in question. In the latter, the state itself, or religion as the case may be,¹ and the individual are the parties in the controversy. The end attained in both cases is the formation and expression of the judgment or a verdict by the supreme authority, which shall reassert the principle of a right presumed to be already in existence.²

The boundary line separating these two kinds of procedure is very vague and variable at different times and with different nations. It depends primarily on the nature of the material or substantive law of that period and nation. It is the point of view of the people that takes cognizance and recognizes any violation as a civil or as a criminal action. This point of view is in a fluctuating state and subjected to the moral and social conception of the nation and the generation. What is a criminal action at one place and at one time might have been a civil at a different time and place. The reversed places that theft and adultery hold in ancient and in modern law

* Written for the Alumni Association Prize in 1912-1913.

¹ Cf. *infra*.

² Cf. Greenidge, *Legal Proceedings in Cicero's Time*.

will furnish a striking example. Theft in republican Rome,⁸ as well as in Mosaic and Talmudic Law, was considered a civil case, subject to compensation, while the modern legal view is well known. Adultery, on the other hand, was in the above-mentioned systems a criminal offence, while in our law it is only a cause for action. To define, therefore, a criminal action as a case wherein the state appears as a plaintiff as the usual codes give it⁴ would be simply begging the question and utterly inapplicable to ancient law, especially to the Jewish.⁵

However, whatever the differences between these two kinds of procedure may be, there is perfect agreement as to the sphere of their action. Procedure by its definition limits itself to the way and means by which a legal battle is conducted, and as such all laws pertaining to that end, as those concerning the courts, evidence, form of trial, as well as manner of execution of the judgment or verdict, comprise its proper field.

We generally speak of two divisions of procedure, civil and criminal. In reality, criminal in regard to Jewish law is to be subdivided into capital and punitive, *Onshe Haguff*, or such minor offences the punishment of which is flagellation. This division of procedure holds a kind of intermediary position. It participates in both civil and capital, but by the nature of violation as well as by the greatest part of its procedure it belongs to criminal offences. It is best to subsume it under that name and note the exceptions under that particular topic.

JEWISH CONCEPTION OF CIVIL AND CRIMINAL LAW

The basic principle of Jewish law is that any violation against the commandments or precepts of God as expressed in the Scriptures is a punishable act. It is a very wide one and covers an extensive area of all phases of human life. In it, the notion of crime is not distinguished from that of sin. Judaism, as a religion of perfect justice and righteousness wherein the individual holds the highest place possible,⁶ has of necessity placed the highest

⁸ L. C., p. 9.

⁴ New York State, Code of Criminal Procedure.

⁵ Cf. *infra*.

⁶ Cf. for instance the saying: San. 37a: Preserving one life in Israel is the same as preserving the whole world.

value upon the individual's inviolable claims to life, health and safety; but the religious notion still forms the substratum. It is not only the injured individual that suffers, or the state in the person of the injured in case of a criminal act, as the modern theory of criminal law forms it, but God as well. In criminal cases, God or religion takes the place of the modern society or state.⁷

This principle being the basis for the Jewish body of law, the Jewish conception of civil and criminal law presents a number of peculiarities: (a) as to scope; (b) as to division; (c) as to procedure; and finally the entire absence of a certain class of laws relating to the government and its citizens. The scope of Jewish law embraces a great number of laws which are entirely excluded from the great modern systems, namely religious offences. Not only social ethical transgressions such as those relating to immorality, but a great number of a purely religious character, were recognized as crimes punishable by death.

The division between civil and criminal, therefore, is a very difficult matter. The Roman division into *jus privatum* and *jus publicum*, as well as the modern distinction between these classes of law resting on the effect of the act, whether affecting the property of the injured or the personality and character of the plaintiff, does not apply to Jewish law. Assault and battery, which was considered in Roman as well as in modern law a criminal action, is from the Jewish point of view a civil action only; and any more instances, perjury, not Shebuath *bittui*, but an oath taken at court, which is criminal under present-day law, is entirely unpunishable in Jewish law, and has only an effect of disqualifying the offender from being admitted to testify.⁸ The only classification possible is on the basis of the objective principle of punishment. It depends whether the outcome of a certain legal action should be the granting of a sum of money to the plaintiff, either as a restitution or fine, or bodily punishment for the defendant, either capital or flagellation. We have, therefore, three classes of offences, (1) civil, the object of contention being money or right valued as money; (2) capital offences, criminal and religious, punishable

⁷ Cf. *infra*.

⁸ Cf. *infra*. ch. 4A. Philo's assertion as well as Sanhedrin, 27a.

by death; (3) religious offences, criminal and religious, punishable by flagellation.

The religious conception of law has left remarkable effects on the procedure, especially on evidence. Certain restrictions as regards the qualification of witnesses and more details,⁹ are based wholly on religious grounds. It is still more manifest in capital procedure. The prosecutor or accuser in criminal cases in our modern systems is the state through its representatives. In Jewish law, the duty of accusing lay upon every citizen who witnessed the crime.¹⁰ In civil cases, where, in spite of the religious background, the offence was of a private nature, the party injured started the trial. In criminal cases, religion, acting through every member of the faith, assumed the rôle.¹¹

The entire machinery of law having been placed in the hands of the learned, or the priests who for a long time were identical with that class, and religion assuming the place of the state in ancient Jewry, it is no wonder that the class of laws called in Roman law *Prædialic* or treason laws were of little importance. The king had little judicial power. He was rather in the capacity of executive than of judge. The laws were binding for him as for any other subject. It is understood that he was allowed a certain latitude of action, as levying tribute and other things necessary for the welfare of the commonwealth,¹² and that he had the right to command and kill the disobedient;¹³ but all these were merely looked upon as momentary things and were not considered a part of law. The king was not considered as in ancient Rome or in Mediæval Europe, as the source of law. On the contrary, the later Talmudic authorities state that if the king's commandment conflicts with a certain legal or religious law, it is null and void.¹⁴ It is possible that this is a later view, but from the fact that very little relating to state laws has been preserved, we can infer that such laws were considered as temporary. That there were such

⁹ Cf. *infra* ch. 4.

¹⁰ *Maim. San. XIII. 1 T. B. San. 40.*

¹¹ For details cf. *infra* ch. 3; a similar principle prevailed in the Roman law on the basis of the duty of the citizen to the state.—Gnedich.

¹² *Maim. Melochim IV. 1 San. 20b, Tosephta San. 4.*

¹³ *Maim. ibid. III, 8 San. 49a.*

¹⁴ *Maim. ibid. 9, San. 49.*

laws, we have an open statement in the Bible.¹⁵ King Johosaphat, convoking the supreme court, tells them that he attaches to the court a representative of the king's affairs. That *Lêse Majesty* was punishable by death in ancient Jewish polity, is evident from the story of Ahab and Naboth.¹⁶ The king had also additional jurisdiction over those that law could not reach.¹⁷ But all these fragmentary evidences will not prove the king to occupy a legal position as he did in other systems. The fact remains, that crimes of treason and kindred political crimes do not form an integral part of the Jewish law.

THE DEVELOPMENT OF CIVIL LAW

The development of Jewish civil law presents a remarkable contrast to that of criminal law. While the latter retained all through its course of existence its Mosaic character, the former was practically a Talmudic edifice reared on Mosaic principles. The Bible contains comparatively very few civil laws, and even those mentioned are not stated explicitly but casually. Even such important parts of civil law as modes of acquirement and transferring property are not definitely stated in Mosaic law. Contracts and obligations are hardly touched upon. The only laws sufficiently expounded are those of damages and guardians. It is evident that the civil laws mentioned in the Pentateuch were adjusted to an agricultural community, living in the small circle of its family possessions, without possessing much commerce or industry.

As soon as the family circles were broken, and intercourse and commerce spread, the few prescribed laws proved insufficient and a system of civil laws had to be constructed. It is, therefore, possible that under these conditions, Jewish civil law was partly influenced by the systems of more commercial nations with whom they came into contact. Especially the Babylonians might have exerted a considerable influence upon a part of civil law. The earliest mention of a bill of sale as an instrument of trans-

¹⁵ *Chron. ii, 17, 11.*

¹⁶ *Kings, i, 21, 13.*

¹⁷ *Maim. ibid. 10. Jer. Sanhedrin. Cf. infra ch. 6.*

ferring property is in Jeremiah.¹⁸ The Talmud quotes this passage as the legal source for the bill of sale—*shetar*—as an instrument of acquisition.¹⁹ During the second temple, civil law kept on developing according to the life, conditions, usages, and rules of conduct of the age, adapting and modifying usages of other legal systems, most likely Roman.

There is, however, another important factor in the development of Jewish civil law. While criminal and capital laws are closely connected with the existence of an independent state, civil laws enjoy a certain independence of political conditions; an autonomy is an ample field for the growth of civil laws. And as the Jews continued to enjoy their autonomy for a long time in Palestine, and especially in Babylonia, their civil system continued to develop, after the destruction of the state, with still more vigor. In fact, it reached its culmination in Babylonia. Of course, it always possesses a local coloring, but on the whole it has worked out its own principles and character. Procedure shared of course in that development and was subjected to its influences.

CHAPTER I

COURTS AND THEIR ORGANIZATION

The question of court organization in ancient Jewry is a very difficult one. The Talmudic records, though the most authentic, contain, nevertheless, a great deal of pure theory and legal speculation. Many points are rather *de jure* than *de facto*. On the other hand, the only historic documents contemporaneous with the time of the existence of Jewish courts, that of Josephus and occasional remarks in the Evangelical writings are very unreliable. The latter, in particular, cannot be relied upon, because they were not written till the time of the destruction of the temple, and their authors were foreigners. All these apply principally to criminal law, for civil law is almost entirely a production of Talmudic Judaism. With careful consideration the court system can be described.

There were courts of justice in every city. Thus, we have the

¹⁸ Jer. 32.

¹⁹ Kiddushin 26a.

Biblical precept "Thou shalt place judges and court officers in all thy cities."²⁰ Josephus also tells us that there was a court in every city.²¹ These courts were only civil courts. But in cities, the population of which was larger than two hundred and thirty, there was also a criminal court.²²

The composition of the courts varied with their functions. There were three judges for civil cases and flagellation, and twenty-three for capital punishment.²³ This is the Talmudic tradition. In Josephus, however, we find no mention of such arrangements. All through his book he tells us of seven judges established in each city²⁴ to pronounce justice, without mentioning the particular jurisdiction of these courts. This attitude of Josephus caused a great deal of perplexity. The Christian scholars such as Schürer,²⁵ whose attitude towards the Rabbis is of a dubious nature, are of course inclined to accept the view of Josephus against the Halacha and say that whatever the Rabbis theorized, in practice there were only seven judges.²⁶ Weyl²⁷ advances a similar hypothesis. It is not, however, certain what Josephus understands the jurisdiction of these seven to be, whether only civil, or criminal as well. Those that maintain that according to Josephus capital punishment was relegated only to the Sanhedrin of seventy-one in Jerusalem, lack sufficient evidence for this. The passage in Josephus Antiq. XIV, 93, "for Herod has transgressed our law which has forbidden to slay any man, even though he was a wicked man, unless he had been first condemned by the Sanhedrin," does not prove the point conclusively, for the name Sanhedrin applied also

²⁰ Deuter. xvi, 18.

²¹ Ant. IV, 8, 14 Bell. II, 20, 5.

²² San. 2 Tosephta, San. 3, 9. I have taken the view of R. Nehemiah, as it seems to be the most ancient one, being found in both Mishna and Tosephta; in addition, the reason given for this view is a valid one and goes back to ancient Biblical organization, while the reason given in the Talmud, San. 17, for the view of one hundred and twenty is purely mystical. The view of R. Yehuda in Tosephta would not agree with either of them, the Mishnaic view would therefore be a singular one.

²³ Mishna San. 1, 1. Tosephta San. 1, 1.

²⁴ Ant. VI, 8, 14. Bell. II, 20, 5.

²⁵ Schürer II, 1, 149-196.

²⁶ I. c.

²⁷ Weyl, Die Strafrechte bei Josephus, p. 14.

to the court of twenty-three, which is called in Talmud, Sanhedrin Ktano, lesser Sanhedrin. It is also evident from Matthew x. 17, where he speaks of Sanhedrins in the plural. The case of Herod and the trial of Jesus would not prove anything; these cases had to be tried by the highest court for other reasons. Of little importance also is the passage in Bell. 11, 20, 5, where Josephus, after becoming the governor of Galilee, ordered that all matters of life and death should be brought before him and the seventy elders. This act might have been prompted by martial law. On the other hand, those like Grotius and Selden who believe that these courts were also criminal tribunals and try to reconcile the view of Josephus with the Halacha by assuming that there were seven judges and fourteen court officers, two to each judge,²⁸ as mentioned by Josephus, making together twenty-one, and a president and vice-president, thus bringing the total up to twenty-three, are not on terra firma but in the realm of conjecture. The idea that a court should be composed of seven judges and fourteen court officers sounds hardly credible. The words of Josephus, "Let every judge have allotted to him two officers," are very strange, unless we should assume that each judge had a special district and was sole judge in that section with a special court. But we have no basis for this assumption. The matter, however, can be explained in an entirely different light. Josephus, describing his own time, when Judea was already under the rule of the Romans, had no necessity of mentioning the tribunals of twenty-three, for most probably capital cases outside of Jerusalem were no longer under the jurisdiction of the Jews.²⁹ If there was any jurisdiction in capital cases in the hands of Jews, as we find in the case of James³⁰ and Stephen³¹, it was only retained by the supreme Sanhedrin in Jerusalem with the sanction of the procurator. On the other hand, civil cases were the usual order of the courts in every provincial town, and it is reasonable that Josephus should speak only of these. As for the question of seven, there is hardly any contradiction to the Halacha. The Halacha

²⁸ Ant. IV. 8, 14.

²⁹ Cf. Sabbath 15a, Abo. Z. 8b.

³⁰ Ant. XX. 9, 1.

³¹ Acts vii, 7, 57, 58.

speaks of three as the necessary number for pronouncing judgment in civil cases, but it does not follow that this was also the number of judges in an entire city. In ancient Jewry, the departments of justice and administration were not separated; the judges were also the administrators of the town, and this double duty was carried out by the elders, who were the council of aldermen as well as the members of the court,³² and as such the number seven will be a very suitable one. It does not follow, though, that they were all required to sit in judgment at the same time; three might have held court on one day, while the rest attended to other duties. It is probable that in some cases of exceptional character the whole council participated, as we find a trace of it in the Halacha, in regard to the adding of another month to the year, *Ibbur*, and determining the first of the month,³³ that one man, Simon ben Gamaliel, insists on having seven to decide it.³⁴ Another trace of a different arrangement in civil cases might be noticed in the dissenting opinion of R. Meir, who says that civil cases should be tried in a court of five.³⁵ From all this it is seen that the tradition of the Halacha as regards the composition of civil and criminal tribunals is correct and by no means contradicted by contemporary evidence.

Over and above these tribunals there was the supreme court in Jerusalem, of seventy-one members, including a president and vice-president.³⁶ Its jurisdiction was a very wide one covering an extensive field of religious as well as purely legal cases. As regards the legal, it had original jurisdiction only in a few cases. The high priest, false prophet, large bodies of people accused en masse as a tribe or a whole city were tried only in the supreme court. It was also in charge of the appointment of the lesser tribunals, criminal as well as civil.³⁷ Its chief function, however, was that of an appellate and interpreting court.³⁸

³² For the elders as judges, see Deut. xix, 12; xxi, 2.

³³ San. Mishna 1, 1; also San. 10b.

³⁴ It undoubtedly goes back to an old institution, the reason assigned for it in the Talmud is entirely arbitrary, and agadic; cf. also San. 11a.

³⁵ Tosephta San. 1, 1.

³⁶ Tosephta San. 8.

³⁷ San. 2a, 88b.

³⁸ Deut. xvii, 8; Ant. IV. 8, 14; Sifri Deut. p. 152.—Ed.

The nature of the composition of that august body underwent a gradual change. In the early times, it had all three elements, priests, Levites and Israelites, with the priest taking the lead, and high priest presiding.³⁹ In later times, however, the scholars composed most of that body. Whether the presidency of that body was always in the hands of the high priest, as some want us to believe,⁴⁰ and as evidenced from Josephus XIV. 9, 3-5, XX. 9, 1, and many verses of the New Testament, or on the other hand, as the Tannaitic tradition claims, the Pharisees were at the head, is a very difficult one to decide. One thing seems to be clear, however, that in capital cases of a political character, the high priest was not only the presiding officer of the court, but he also had the right to convene it;⁴¹ while in religious matters, as well as legal decisions, the Pharisees and their foremost scholars had the upper hand.

There were four officers attached to each court, two acting as secretaries and two as summoners and executors.⁴² Josephus tells us that each judge had two officers from the tribe of Levi allotted to him.⁴³ While this number is extremely large and is incomprehensible, his other assertions that they were of the tribe of Levi is historically true. The first mention that we have in the Bible of a regularly established supreme court speaks of the Levites as court officers.⁴⁴ A similar view is also found in the Talmud even as late as the middle Amoraic period.⁴⁵ But in later times, probably about the time of the second temple, this restriction was abandoned and officers were appointed without any reference to their tribal descent. In addition to these regular criminal and civil tribunals, civil courts underwent, in later Tannaitic times, a certain modification. Business transactions multiplied and it became impossible to have in every Jewish settlement a regular court of three ordained judges. Accordingly, the custom was introduced that even one man, if he were only a scholar and acknowledged by

³⁹ Chron. ii, 19; viii, 11.

⁴⁰ Schürer II, 1, 149-195.

⁴¹ Cf. Ant. XX, 9, 1.

⁴² San. 36b and 17b.

⁴³ Ant. IV, 8, 14.

⁴⁴ Chronicles xi, 19, 11. Cf. Sifri Deut. p. 15.

⁴⁵ Jebamoth, 86b.

the people to be such, had a right to pronounce judgment,⁴⁶ and even to force the parties to accept his decision.⁴⁷

Three plain men, even if not scholars, have the same right to pronounce judgment and force the parties to appear.⁴⁸ If any error has been committed by these judges, whether the court consists of a single scholar or of three ordinary people, and if the error is in a matter of reason, Shikul Hadaath, the judgment is considered valid, but the member or members of the court must pay. If commissioned by the exilarch, the court does not need to pay.⁴⁹ If the error is in a statute law the decision of all courts is reversed.⁵⁰ If the single judge-scholar has been accepted by the parties, he has a right to reverse the judgment, but if impossible, he does not need to pay.⁵¹ In all cases, a single uncommissioned scholar and a three-member court of ordinary people have the same judiciary power. Their jurisdiction applies only to contracts, debts and obligations, but not to severe civil cases, as robbery, assault, battery and similar cases.⁵²

QUALIFICATIONS OF JUDGES AND MANNER OF APPOINTMENT

Every Jew, even of illegitimate birth,⁵³ if he but possesses high intellectual and moral qualities,⁵⁴ is qualified to sit in the civil

⁴⁶ San. 5a.

⁴⁷ San. 5. Josephoth; also Ashri ad locum Maimon. H. San. 6, 2.

⁴⁸ 1. c.

⁴⁹ Rosh to 4th Chapter San.

⁵⁰ San. 33a.

⁵¹ Maim. 1. c.

⁵² The question of change in the composition of the one in the civil courts is a very difficult one. We do not find it in the Mishna. The Mishna in Behoroth 28, is hardly convincing. The case of R. Tarphon is rather a religious than a civil one. The only Tannaitic source is the baraita in San. 5. It is possible that it has originated during the late Tannaitic period. We even find a man of this age, R. Ishmael ben Yossi, protesting against this custom. Cf. Aboth 4, 8, where he says, do not judge singly. It is of course rather an ethical precept than a legal maxim, yet that shows that this institution is not of very old age. Possibly the influence of Roman law, where a single judge was assigned to try a case, had something to do with that.

⁵³ San. 36b. Maim. H. San. 2, 9.

⁵⁴ Sifri 15. Ed. Fri. These are seven in number, wisdom, modesty, fear of God, love of people, of truth, hate of greed, and respectability.

court. A proselyte whose mother was a Jewess is qualified to judge in civil matters.⁵⁵ All those who are disqualified to testify, whether on account of religious transgressions, consanguinity or bodily defects, are also disqualified as judges.⁵⁶ A man blind only in one eye is admitted to civil courts,⁵⁷ but if he is totally blind he falls under the category of disqualified witnesses.

The qualification for the judgeship in the criminal courts was much higher. The candidates for that office must be of full-blooded Jewish parentage, members of noble families, such as are able to form alliances with priests.⁵⁸ In addition, they had to be free from all bodily defects, and of an impressive physique. They had to be great scholars of the law.⁵⁹ The required age for a candidate was forty years. On the other hand, very old age was a disqualification.⁶⁰ One who had no children, or was extreme in his temperament, either too harsh or too kind-hearted, was also disqualified.⁶¹ In all these qualifications, the class of offences known as flagellations were treated in the same manner as capital crimes.⁶²

The appointment of regular judges was performed by the supreme court in Jerusalem. It was its duty to investigate and find out the proper men for judges in the provincial cities. If a judge in a local court proved efficient, he was promoted to a higher court in Jerusalem, and then to a still higher one, till finally the supreme court was reached.⁶³ As a prerequisite to appointment, ordination, Semichah, was necessary. This is considered a regular court action, and a membership of three, one of whom was ordained, was required for that process.⁶⁴ Ordination was limited to Palestine.⁶⁵ In Babylonia, where the exilarch had large judiciary powers, his granting commission took the place of Palestinian ordination, and

⁵⁵ San. 36b Tosaphot. Maim. l. c.

⁵⁶ San. 27b, see *infra* ch. 4.

⁵⁷ San. 36b.

⁵⁸ Mishna San. 32a.

⁵⁹ San. 17a, 36b.

⁶⁰ San. 36b. Maim. San. 2, 3. The question, however, is not settled.

⁶¹ San. 36b, *Tosephta* 7, 5.

⁶² Maim. San. 16, 2.

⁶³ *Tosephta* San. 7, 1; San. 88b; *Tosephta* Hagiga 2.

⁶⁴ Mishna San. 2a, Maim. l. c. 4.

⁶⁵ San. 14a.

his appointees enjoyed the full rights and privileges attached to regularly appointed judges.⁶⁶

TIME AND PLACE OF COURTS, SALARIES

Regular court sessions in provincial towns in civil cases were held on Mondays and Thursdays.⁶⁷ This is supposed to be a very old institution going back to Ezra,⁶⁸ but it seems that this arrangement was not observed and court was summoned whenever necessary.⁶⁹ Time of court session was from morning services until noon,⁷⁰ but if necessary it could be continued in the afternoon, and even at night in civil cases.⁷¹ However, no original judicial proceedings of whatever nature could begin at night;⁷² capital cases could be decided only by daylight.⁷³ Days on which court could not be held, as on Holidays and Sabbath, it was not held even on the eve of these days.⁷⁴ Some legal court proceedings were postponed during the months of Nissan and Tishri.⁷⁵ This applies only to civil but not to criminal cases.⁷⁶ In Jerusalem, however, the supreme

⁶⁶ San. 5a.

⁶⁷ That this institution of Ezra is only for civil cases is evident from the whole system of Jewish criminal law, for there was no calendar of cases and the whole legal system that we have now. We must also remember that capital offences were rather rare, and it is impossible that capital court sessions should be held twice a week.

⁶⁸ Baba Kama 82a.

⁶⁹ Ketuboth Bab. 3a; Jer. I. 1. The whole question of the institution is doubtful. The reading in Ketuboth 3a is undoubtedly incorrect as *Tosephta* ad locum has remarked. Ezra could not introduce such a *Takanah* which should tend to minimize the efficiency of legal machinery, from every day court to twice a week only. That this old institution had to undergo a change in Talmudic times, when commercial relations became a regular feature of the life of the city dwellers in Babylonia and even Palestine is evident from the above passages in Jer. and Babyl.

⁷⁰ Sabbath 10a.

⁷¹ San. 32.

⁷² San. 35.

⁷³ San. 32. It is noteworthy that the same rule is also prevalent in Roman law XII tables.

⁷⁴ San. 32. Jer. San. 4, 6. Originally this law applied only to capital offences l. c., but later procedure included also civil.

⁷⁵ See B. K. 113a Maim. H. San. C. 25, 9 and *infra*.

⁷⁶ San. 43 Hashmototh. Cf. Talmud there as well as the whole trial of Jesus.

court as well as the lesser courts sat every day from morning to evening.⁷⁷ As a religious court the Sanhedrin also sat on Holidays and Sabbath.⁷⁸

There was no definite place for the provincial courts. In early times, the city gate was also the seat of justice. The Bible mentions this very often.⁷⁹ In later times, in Jerusalem, there were fixed places for the various courts. A tribunal of twenty-three sat at the Temple Mount, another one of the same number, at the entrance to the Temple, and the supreme court in the Lishkath Hagosith.⁸⁰ The smaller civic tribunals sat usually around the Temple or near by.

Originally, judges were not paid for their services. The judgeship was rather an honorary position. Later a salary was fixed for professional judges who devoted their time to the work.⁸¹ In Jerusalem, there was a regular civil court of three who were paid from the Temple treasury.⁸² However, the prevailing opinion of the Rabbis is that justice should be administered without expectation of reward.⁸³ This money is distinctly expressed not as remuneration for work, for in this case his judgments are null,⁸⁴ but as reward for the time that he spent.

EXTENT OF COURT JURISDICTION

In criminal cases there was no limitation placed upon the power of any court. Whenever a complaint was lodged against any man by a witness complying with all the necessary requirements for such a charge, he was brought to trial if he was only within reach of the arm of justice.⁸⁵ The case of an Ir Hanidabath is an exception, also the case of a whole tribe, the judgment of which belonged

⁷⁷ Tosephta San. 7, I; San. 88b.

⁷⁸ Tosephta *ibid*.

⁷⁹ See also Sifri Deut. 149.

⁸⁰ Tosephta *ibid*.

⁸¹ Nedarim 37a.

⁸² Ketuboth 105.

⁸³ Some of the Rabbis were unfavorable to judges who were poor. Cf. Mechilta Jethro 2, which says a desirable quality for a judge is that he should be rich.

⁸⁴ Bechoroth 29.

⁸⁵ Maim. H. San. 12, 1.

to the jurisdiction of the highest tribunal of seventy-one.⁸⁶ In civil cases, however, the matter was not so simple. In cases of debt and obligations, the court of justice was the one residing in the domicile of the plaintiff. He had also a right to bring the matter before a higher court, but the defendant had no choice.⁸⁷ The same applied also to cases of damage to property and of injury, the choice resting with the plaintiff, and the defendant being forced by court to comply with the former's wishes. In other cases neither of the parties had a right to bring the case before a higher court, but was subjected to the local one.⁸⁸ If the plaintiff was poor and the defendant rich, and there was a suspicion that the plaintiff wanted to take advantage of his position in order to cause the defendant expense, the case could be tried in a higher court only on the presentation of a certificate from the local courts that there is a ground for the claim.⁸⁹

If there were several courts in the city or there were incompetent judges, the matter of judges was left to the parties. Each party selected a judge and both chose a third one.⁹⁰ The selection was by written documents,⁹¹ and if both parties signed the documents they could not retract their choice.⁹²

⁸⁶ San. 2a; cf. *supra*.

⁸⁷ San. 31b. Baba Kama 112. Maim. l. c. 6, 7 and Tos.

⁸⁸ San. 31b. Maim. l. c. 6, 6.

⁸⁹ Asheri to Baba Kama, ch. 10.

⁹⁰ San. 23a. In Roman law the *judex* had to be accepted by the party.

⁹¹ Baba Mez. 20a. Cf. Rashi.

⁹² Rashi *ad locum*.

CHAPTER II

JURISTIC PERSONS

In civil cases every person of the Jewish faith over thirteen years and one day of age, women over twelve years and one day, are considered juristic persons, and can become a party to a suit.¹ Minors, insane, and deaf and dumb persons have no juristic right.² If a man is periodically insane, then his juristic right fluctuates;—during the sane period he is entitled to full rights.³ One who is either deaf or dumb has full rights.⁴ In regard to immovable property, there are three stages for minors. Below legal age, no rights whatsoever are granted to them; after age the case becomes an individual one: such youths as are in the eyes of court qualified to exercise the rights are granted them.⁵ This applies to his own property, and such suits as arise from his dealings with it. But if the property is his father's, he has no right to sell it in whatever manner, till he becomes twenty years of age.⁶ However, he has a right to give it away.⁷

Jewish law, as well as all ancient law, does not know of corporations or corporate bodies as juristic persons. But philanthropic institutions, if only organized, have a juristic standing. The officers of the city charity are a juristic personality. They are empowered to receive gifts, bequests and all other things; they can become parties to a suit.⁸

¹ In regard to selling and buying, minors from nine to thirteen have legal power to the extent that if they buy or sell anything the action is valid. It is possible that Roman law has influenced somewhat this enactment, for there children of that age have a similar right. This right, however, is limited to movable things, but to sell immovables, eighteen years is the limit.

² B. K. 87.

³ Tosephta Teruma 1, 4.

⁴ Gittin 59a.

⁵ B. B. 155.

⁶ l. c. Maim. H. Meehira.

⁷ Ch. M. 201, and Yore Deo Hil. Zedaka.

⁸ 2 Ibid.

CRIMINALLY INDICTABLE PERSONS

Jewish law does not know of any exemption. Every one is subject to the law and its penalties, even the high priest.⁹ Unindictable persons are those who fall under the category of non-juristic persons, namely minors, insane, and deaf and dumb persons, with all the exceptions mentioned above. In regard to periodical insanity the case is similar to that in a civil suit. Intoxicated persons are unindictable and have the status of idiots.¹⁰ As regards the age of punishment, the usual age is when the person becomes a major, thirteen years and one day; but in this case there is still another condition and this is physical development and maturity.¹¹ If the signs of maturity do not appear at the usual age, the young person has still the status of minor till twenty years.¹²

Note.—It is curious to note that Jewish law makes punishment dependent on maturity. It seemed to the Rabbis that sexual immaturity necessarily implies also mental imperfection and, consequently, a lack of responsibility. In regard to the early age of punitivity it must not be forgotten that in the East early development is the rule, and a person of fourteen is a fully matured man or woman. However, the question of punishment at the age of from thirteen to twenty is still an open one. There is a later haggadic remark that the Heavenly court does not punish below twenty. (Sabbath 93.)

⁹ San. 17a.

¹⁰ Erubin 65a.

¹¹ Niddah 45b.

¹² Jebamoth 82a.

CHAPTER III

THE TRIAL

(a) *Civil*

SUMMONS

The plaintiff and the defendant were the parties to the suit in civil cases. The plaintiff came to court and asked it to invite the defendant to justice. The court messenger then took the summons to the party. It was usually an oral summons, but it might also be written.¹ The summons had to be delivered in the name of the whole court and not in the name of one judge,² except if it happened on regular court days,³ or if it were signed by an ordained judge.⁴ The cost of the summons had to be paid by the plaintiff.⁵

In the summons the appointed court days are stated. If the day was not appointed but chosen by the parties, some consideration had to be given to the business affairs of the defendant.⁶ If he refuses to come to court he is put under a ban, *niddni*. A document containing the declaration of the ban is written and signed by the judges.⁷ It is called *Pessika*. A verbal ban can be placed upon one on the testimony of the court clerk who says such and such a person was summoned to court and refused to come, but no written document can be issued on his word.⁸

Three different court days are given to the man who pleads absence and then the ban is written.⁹ Should it, however, become known that the said party was in the city, and wilfully refused to obey the court, then the ban is signed that same day.¹⁰ A summons

¹ Gittin 88a.² San. 8a.³ Beth Joseph Ch. M. 11.⁴ Gittin 88a.⁵ l. c. Shach. Ch. M.⁶ Ch. M. 11.⁷ B. K. 113a; Maim. San. 28, 8.⁸ B. K. 112b.⁹ l. c. 113a.¹⁰ l. c.

can be delivered through the neighbors or acquaintances, but if there is a possibility that they were unable to notify him or otherwise to fulfil their trust, no ban is written unless the court messenger has met the party personally and told him of the summons.¹¹ The ban document is torn up only when the party appears personally in court, and no promises are accepted.¹² Roman law has a similar kind of forced summons called *vadimonium*, a kind of bail, but this was only for a second appearance. The right to summon lay always in the hands of the plaintiff, or the claiming party; in certain cases, however, the defendant or the party on whom there is claim could force the claimant to bring his claim before the court.¹³

REPRESENTATION OF PARTIES

In the Biblical period the parties were generally expected to appear before court in person. The passages in the Bible speaking of civil cases indicate that manner of procedure.¹⁴ Even the early talmudic law is against any presentation of the charge through a third person.¹⁵ Yet, later talmudic law under the stress of extensive business transaction acknowledged representation. The mandate must contain the following words: "go try the case and win it for your sake."¹⁶ This mandate must be strengthened by a regular *kinyan*. In this form the representative was a kind of temporary owner of the property in question.¹⁷ The relation of the representative to the sender is still considered as the relation of an agent, provided there is a certain clause to this effect in the document.¹⁸ There was no limitation to representation, even women and slaves being able to become representatives.

The one who had the right to act as a representative had no right to give his mandate to any other one.¹⁹ The mandate expires the moment it is recalled by the mandator, or granted to any one

¹¹ l. c. 112b, 113a.¹² B. K. 113a.¹³ Ch. M. 131.¹⁴ Ex. xxii, 8.¹⁵ Mechilta Mishpotim 20. A similar passage is found in Shevuoth 30b.¹⁶ B. K. 70a.¹⁷ Ibid. Maim. Sholuhim 3, 1. Keseph Mishna.¹⁸ B. K. 70a.¹⁹ Alfasi B. K. ad. locum for Ch. M. 123.

else.²⁰ Upon the death of the mandator the mandate became nullified, unless there was a formal act of empowering or *kinyan*.²¹

The husband is the legal representative of his wife in all matters relating to such property belonging to the class for which the husband has guaranteed a sum of money equivalent to its value so that the title is invested in him, *Zon Barzel*, and also in those cases relating to other classes the title of which is vested in her, but he enjoys the benefit of their income, *Malug*.²²

In an undivided estate one of the family may act as representative for the rest without any mandate. The members of a corporation have the same right.²³ This applies only if the other heirs are in the same city, so that their inactivity is considered as assent. If they are absent, their formal consent is required.²⁴

This privilege of sending a representative was extended only to the plaintiff.²⁵ The reason is, that for psychologic grounds the representative of the defendant may produce false arguments, with more semblance of certainty than the defendant himself.²⁶ Besides, the plaintiff is supposed to have positive rights to tangible things, whether property or money, and such rights can be transferred to an agent by the normal act of *kinyan*, while the defendant has only verbal answers, which cannot be transferred, so that his representative is only a lawyer, and such an office is forbidden by Jewish law.²⁷ There were, however, some exceptions to the rule. Women and great scholars were allowed to state their arguments before the clerk of the court in the presence of the plaintiff.²⁸

²⁰ Maim. 1. c. 8.

²¹ See Ch. M. 122, 2 and commentaries. The whole question of representation depends on the question, whether the one who holds the mandate is a mere agent or a regular partner by virtue of the language of the mandate. The views expressed in Talmud differ. The view of later jurists is that he is a mere agent; but yet where there was a *kinyan*, or where the case deals with immovables, the question of ownership comes in. It would also affect the question of the revoking, but the details have no place here.

²² Gittin 44b.

²³ Ketuboth 94a; Maim. Sheluchin 3.3.

²⁴ 1. c.

²⁵ Ch. M. 124.1.

²⁶ Cf. Mechilta Mishpotim 20.

²⁷ Ashri Sheb. 4a; also Ch. M. 124; and San. J. 1.1.

²⁸ Ashri Shebuoth Ch. 4 in the name of R. Hannanel.

Note.—I have accepted the view usually taken by the greatest authorities on Jewish law. The question, however, is an open one. A passage in Jer. San. 1. 1, in regard to the high priest being judged, the Talmud says pointedly, let him appoint a representative. The answer is that if an oath is to be taken the representative cannot take it. The force of this question shows that the custom of appointing a representative was common. A number of Jewish jurists have, on the basis of this assertion, decided that the defendant has really the right to send a representative; but those who oppose it argue that question there is raised only because the defendant is the high priest. But in face of the generality of the question such arguments are hardly justifiable. However, in any case, this is of a later development, as the name *antler* signifies Greek origin.²⁹ It was probably borrowed from Greek or Roman law, and never received any widespread sanction in Babylonia, since we have no mention of it in Babylonian Talmud nor an equivalent Hebrew or Aramaic name.

GENERAL FACTS OF PROCEDURE.

The smallest amount of money that Jewish law takes cognizance of and that can become the object of a lawsuit is a *peruta*, a very small sum.³⁰ The possibility of starting a lawsuit on less than a *peruta*, if the object of contention is a vessel,³¹ is disputed. (See Jer. Sheb. 6.)

Both parties must stand during the trial, and the judge sits. The court, however, had a right to allow one of the parties to sit down.³² The decision must be heard by both of them while standing. In regard to the order of cases on the calendar, the order of arrival was followed.³³ However, some exceptions were allowed in regard to orphans, widows and scholars. The cases of orphans preceded all others; the widow's case took precedence over the scholar's, and the scholar's over ordinary cases.³⁴

²⁹ See Aruch Completum, Article *Antler*.

³⁰ Maim. Toan Venitan 3.

³¹ Maim. L. C. S.

³² Shebuoth 30a.

³³ San. 8a.

³⁴ Maim. San. 21.6; Shebuoth 3a; Ketuboth 105b.

FORM OF TRIAL AND MANNER OF ARGUMENTATION

When the parties appeared in court the trial began; the arguments of each of the parties had to be produced in the presence of both of them. The judge had no right to hear one party without the other.³⁵ The judge during the argumentation is supposed to be a silent listener. He has no right to interfere even when one of the parties does not follow all the rules of court. For instance, should one party bring only one witness, the judge should not confuse him by saying one witness is not sufficient.³⁶ He, however, is allowed to help a party if for any reason he can not state his arguments accurately.³⁷

The arguments must be delivered orally. With the consent of the parties the court clerk took the arguments down in order that the litigant might not change them later. The cost of employing clerks was covered by both parties.³⁸ The parties were to plead their case directly, no lawyers being admitted,³⁹ nor any interpreters. If the judge understood the language spoken by the parties but could not answer in the same language, he was allowed to use the services of an interpreter.⁴⁰

Before the judge heard the arguments a call for settlement was issued to the parties.⁴¹ If such was refused the trial proceeded. The plaintiff spoke first, and made the charge. If the defendant put in a countercharge and demanded thirty days to prove it, the delay was granted, under certain circumstances.⁴² In case there was a doubt as to the truthfulness of one of the parties the court had a right to condemn the party.⁴³

If the plaintiff bases his arguments on a document signed by the defendant, and the latter denounces the document as false and demands a copy of it, the plaintiff is obliged to give it. If after the

³⁵ Shebuoth 31a.

³⁶ Jer. San. iii, 8.

³⁷ Jer. l. c.

³⁸ B. B. 167a.

³⁹ See Mechilta quoted above.

⁴⁰ Macoth 6b.

⁴¹ San. 9a.

⁴² B. K. 46b.

⁴³ Ch. M. 75a.

completion of the arguments, any additional proof is offered, such can be put before court only so long as the parties have not left the court room; after leaving it, no additional proof can be advanced. No evidence contrary to previous proof is admitted. If the same party wants to retract his statement or alter it in any way, he can do so even after he has left the court, provided his previous proof was not contradicted by witnesses.⁴⁴ In the latter case he can do so only if he offers a reasonable excuse for the making of his previous statement; and even then it is admitted only when he has not left the court room.⁴⁵ At the request of the parties, a postponement for thirty days might be granted by the court for the purpose of finding evidence.

After sentence was pronounced, no arbitration was possible except in case where an oath had to be taken.⁴⁷

(b) Criminal

INDICTMENT

As has been remarked above,⁴⁸ religious duty rests upon the witness of a crime to indict the man who has committed the crime and bring him to court.⁴⁹ The Bible continually urges the abolition of crime by every one.⁵⁰ The matter of indictment was rather simpler than in modern times. Indictment was based on the principle of accusation, not by any means on investigation. No one could be brought to court on mere suspicion, nor could any request for investigation and inquiry be granted. The accusation had to be a clear statement substantiated by evidence, conditioned by a certain number of requirements. Even if the judge himself

⁴⁴ The reading of the Rambam is "Hoachrono" which means the last, in the sense of the one before, otherwise the passage does not give any meaning and is contradictory. See Boer Hag. Ch. M. l.

⁴⁵ B. B. 31a; Maim. Toan Venitan 7, 8.

⁴⁶ San. 6, 2. See Tosephoth ad locum beginning "Nigmar."

⁴⁷ Vide supra introduction.

⁴⁸ The same principle prevailed in Roman Law. Every citizen could set the legal machinery in motion. Gneidich, Legal Proceedings in Rome, p. 10. It is also at the basis of the Common Law.

⁴⁹ See also Sifri 11, 50.

saw the crime, if the conditions were not fulfilled, no indictment could be issued.⁵¹

The real indictors then were the witnesses to the crime. These two witnesses came to court and accused the defendant. No importance could be attached to any accusation unless it fulfilled the following conditions. Not only had the witnesses to see the crime, but they had to warn him.⁵² A crime committed without the doer being warned just before the commission⁵³ was not indictable. The warning could be given by the witnesses themselves or by any one else in the presence of the witnesses. Both witnesses must issue the warning, though not necessarily at the same time.⁵⁴ The warned one must acknowledge the acceptance of the warning audibly and must express his defiance of the law and punishment.⁵⁴ The warning must state the kind of punishment this violator will be subjected to. If there are two kinds, he is punished by the one he is warned.⁵⁵ Those excluded from warning are, (1) false witnesses, (2) seducers to worship idols, (3) and thieves who steal at night.⁵⁶⁻⁵⁷

As soon as some one was indicted, the court was summoned and speedy justice was meted out. It follows, therefore, that detention houses for culprits awaiting trial were almost unnecessary. In cases, however, where the particular character demanded a delay in the trial, as in the case of one mortally wounding the other, and it was not known whether the injured party would die or recover, and a certain amount of time had to elapse till the fact might be ascertained, then the culprit was detained by the court until the trial.⁵⁸ No bail was accepted in such cases.⁵⁹

Persons who committed homicide in self-defence or in defence of others, were not subject to indictment. The case of self-defence

⁵¹ San. 38b; Tosephta San. 8, 3.

⁵² San. 80a; Tosephta San. 11.

⁵³ San. 40a; Tosephta San. 11, 3; Mishna Macoth 6b.

⁵⁴ San. 8b.

⁵⁵ Chulin 81b.

⁵⁶ Macoth 4b, 13b; San. 72a.

⁵⁷ About punishment for those that are not convicted legally see further chap. 5.

⁵⁸ Mechilta Mishpotim 6; San. 78b; also Numb. 15.

⁵⁹ Mechilta l. c.

belongs primarily to the case of a thief breaking in a house; any one committing such an act of theft forfeits his right to life, and the person, owner or any one else, is permitted to kill him.⁶⁰

Killing in the defence of others is also permitted and even obligatory upon any who witnesses certain crimes, the general character of which may be described as violations on the part of the transgressor which result in grave injuries to the victim. However, this mode of prevention must be resorted to only when it is the only one left and when the injury of one of the limbs of the transgressor would not prevent the crime.⁶¹

FORM OF PROCEDURE

After the indictment, the trial begins. The judges must be absolutely impartial and must be amicably disposed not only to the defendant but towards each other⁶² as well as to the accuser.⁶³ A member of the court who has witnessed the crime is disqualified for the trial of that particular case.⁶⁴ As long as the defendant was not convicted he did not forfeit his citizen rights and any injury done to him or by him during that period of trial were punishable.⁶⁵ Until he is convicted he is still considered innocent.⁶⁶

DELIBERATIONS

The sitting of the court was in a peculiar way. The seats were arranged in a semi-circular order, in order that the judges might see each other while listening to the arguments.⁶⁷ Two secretaries wrote down the proceedings of the court. Around the seats of the court members were arranged in rows of twenty-three each, the seats for ordained but not appointed pupils. In case of a tie, when the process of adding to the number of judges was taking place, these candidates in the rows supplied the needs. The in-

⁶⁰ San. 72a; Maim. H. Geneva 9, 4.

⁶¹ San. 74b.

⁶² San. 29a; Maim. 7b.

⁶³ Sifri 1, 160.

⁶⁴ Tosephta Macoth 1, 3.

⁶⁵ Mechilta Nezikin 4; Sifri 1, 160.

⁶⁶ Shabbath 127a.

⁶⁷ San. 36b.

dicted, the court policemen, and witnesses took their stand after the last row of candidates. In order that public curiosity should not prove annoying to the defendant, his name was not called and his identity was more or less concealed by his being placed between the first and second witnesses.⁶⁸ After court assembled the witnesses were called and deposited their testimony. A severe examination began. After the examination was closed, the deliberation of the court began. There were no lawyers for defence admitted, but it was the duty of the court to act as defenders. The court then partook of the nature of a deliberative jury.

The deliberation opened with an argument for the defence.⁶⁹ It was opened by the youngest judge.⁷⁰ In arguing for the defence a voice was granted to the candidates in the rows, but not for condemnation.⁷¹ Witnesses were not allowed to advance arguments for defence;⁷² but the accused could if he wanted to.⁷³

Had one of the court members gone on record on the side of the defence, he could not retract his statement and change his opinion for condemnation. Had he argued for condemnation he could change to the defence.⁷⁴ There is no difference whether the change is during the arguments or at the taking of the decision, the same rule holds good.⁷⁵ In giving the decision, the reason for voting had to be furnished, the one vacillating in his opinion need not furnish any reason. If one of the defenders erred in giving his reason for acquittal the secretaries reminded him. If this happened to those that found the accused guilty, the secretaries were silent.⁷⁶ In counting the votes only those were counted as separate votes that were supported by different reasons. Should two argue from the same reason, there is only one vote.⁷⁷ Even if one

⁶⁸ Tosephta San. 8, 2.

⁶⁹ See Sifri 1, 12; San. 32b.

⁷⁰ l. c. San.; Jer. San. 4, 7.

⁷¹ San. 40a; 33b, 82.

⁷² Tosephta San. 9.

⁷³ San. 40a.

⁷⁴ San. 32a.

⁷⁵ Jer. San. 4, 4; Tosephta San. 9, 1.

⁷⁶ San. 34a-17a.

⁷⁷ Tosephta San. 9, 1.

in his arguments quotes the two authorities for his reason, he is preferred to two members who quote one authority.⁷⁸

Each judge was urged to have his own opinion, and was not merely to follow blindly the opinion of his superior.⁷⁹ The task of finding one guilty was considered a very severe one and was so considered by the judges. Full time was given by the court for deliberation even if the case was clear. No condemnation could be given in the same day. No two cases of capital character could be judged in one day.⁸⁰ On the day of the giving of the decision the members of the court were urged to eat little and drinking of wine was not allowed.⁸¹ Jewish law recognized the value of human life and treated the case where a life was at stake with its due respect.

⁷⁸ San. 34a.

⁷⁹ Tosephta San. 7, 2.

⁸⁰ Jer. San. 4, 5; Tosephta San. 7, 2.

⁸¹ Tosephta San. 9, 1.

CHAPTER IV

EVIDENCE

Civil

EVIDENCE IN GENERAL AND SELF-TESTIMONY

Evidence is the most essential part of procedure. It was admitted after the plaintiff and the defendant had produced their arguments. The most conclusive kind of evidence was considered in civil cases the confession of the defendant.¹ The confession had to be made in court generally, but if it was made out of court in such a way that there were no possibilities of evasion, as much as to say, "I was merely joking," or making pretence that the confession was made with the purpose of misleading people as to his wealth,² the confession is valid. In court, all such subterfuges were not admitted, and the confession went on record against the debtor. If he confessed before two witnesses, and strengthened the confession by a kinyan, the loan became as binding as though it were originally borrowed on a document.³ If he confessed before a regular court, the same went into effect without a kinyan.⁴ If the court was acting simply by mandatory power of the parties, the writing had to be affected through a kinyan.⁵ Silence was considered as a confession.⁶ In cases where the defendant could offer some reason for his silence it was not adopted as confession.⁷ In case there was a clash between the confession and subsequent witness testimony, the weight was placed upon the former.⁸ Partial confession was valid for that part, and for the rest an oath was administered.⁹

¹ Gittin 40a.² San. 29a-b.³ San. 29b.⁴ Ibid. Tosephoth "Mar"; Maim. H. Malve Velove 7, 3.⁵ I. c.⁶ B. M. 6a.⁷ See B. M. 73a-b.⁸ B. B. 5b.⁹ B. M. 4b.

WITNESS EVIDENCE

The testimony of two qualified witnesses is necessary in order to decide the case. One witness is not sufficient except as forcing the opponent to take an oath.¹⁰ In a few religious cases and in one religious-civil case the testimony of one witness is admitted. This is the case of *Aguna*, of one whose husband disappeared, and the testimony of his death comes up.¹¹ It is the legal as well as religious duty of every two witnesses to come and testify,¹² and they can be forced by court to do so.¹³ In civil cases, however, the duty is obligatory only if they were asked by the party to appear in court.¹⁴ Witnesses must testify gratis. Should it, however, be disclosed that they were paid, the testimony is not valid.¹⁵

QUALIFICATION OF WITNESSES AND DISQUALIFICATIONS

A qualified witness in a civil case must possess the following qualifications. He must be of the male sex;¹⁶ he must be 13 years and one day of age;¹⁷ and a free citizen.¹⁸ Those that were either physically or mentally unsound, as the deaf and dumb, as well as one who is dumb though not deaf were prohibited from testifying. The reason for the last named disqualifications is not that he is not a juridic person,¹⁹ but because testimony has to be given orally. Mentally unsound are debarred; if one is periodically insane, one has the status of both.²⁰ A person blind in both eyes is debarred;²¹

¹⁰ Sheb. 40a.¹¹ Jebamoth 117b.¹² B. K. 56a.¹³ To be inferred from the question in I. c.; then the words "potur midine odom" refer only to one witness and not to two. See Maim. Minyan Hamitzvoh.¹⁴ Sheb. 31b.¹⁵ Bechoroth 29a.¹⁶ Sheb. 30a; Jer. San. 31; B. K. 88a. There is a difference in the Biblical deduction between the Bab. and Jer. This shows that the custom was practised and reasons were sought for it. Josephus in Ant. iv 8.1-15 quotes the same law and gives the reason that women are disqualified from being witnesses on account of their levity.¹⁷ B. K. 88a.¹⁸ I. c.¹⁹ See supra Chap. II.²⁰ See Tosephtha Teruma and above Chap. II.²¹ Gittin 23b; B. B. 128a.

if only in one eye, he is admitted.²² The reason for the disqualification of the blind is because evidence, according to the Jewish conception is limited to those that have seen the act.²³

Relationship either to the parties or to one another or even to the judges disqualifies the witnesses.²⁴ Even relationship to the voucher disqualifies one.²⁵ The oldest form²⁶ followed the paternal line. Only those relatives were disqualified who were related on the paternal side. The principle laid down was the principle of inheritance—all those qualified to inherit the father at his death were considered relatives. The later authorities included relatives on the maternal side as well. The degrees of relationship are three. Class A includes father, son, brothers, husband and wife. Class B includes the children of brothers as well as grandson and grandfather. Class C includes the grandchildren of brothers, as well as great-grandfather and great-grandson. The principle is the following,—A and B, B and B are disqualified, B and C are qualified; as regards A and C, there is a difference of opinion.²⁷ In all these cases, the relations by marriage are considered of the same class as the original one.²⁸ A betrothed is disqualified to testify for or against his betrothed,²⁹ but only in cases affecting her personally.

Those that transgress a religious offence for which flagellation is the punishment are disqualified.³⁰ The Bible says distinctly,³¹ "Do not associate with the wicked man to be a false witness." This leaves a wide field for interpreters to define the word wicked.³² Those who transgress a religious-civil offence whether a severe or a light one

²² San. 34.

²³ Lev. v.

²⁴ Maccoth 6b.

²⁵ Maccoth 7a.

²⁶ Mentioned in the old Mishna San. 28a.

²⁷ Maim. following the Bab., accepts the principle that C and A are qualified. Rabbenu Tam on the basis of a question in Jer. 3, 3 takes the negative view. In all these cases we accept rather the Mishnaic view that limits only A and B.

²⁸ I. c.

²⁹ San. 27b; Maim. H. Eduth 13, 2.

³⁰ San. 25a.

³¹ Exodus xxi.

³² Cf. Maim.

(if only there is a possible conclusion that the man is eager and willing to stake his honor and religion for the sake of gain), are disqualified.³³ This includes all kinds of gamblers, usurers, and the like. In addition to all these classes, a few more cases may be added, which are disqualified on the same principles underlying the above classes. These are a refuted witness,³⁴ and one who from the nature of the case might have same interest in it.³⁵ All those that are disqualified for religious or for religious-civil offences have a chance to recover their legal rights if they improve their conduct to the satisfaction of the court.³⁶

DEPOSITION OF TESTIMONY AND EXAMINATION THEREOF

Testimony was deposited orally³⁷ in a language understood by court.³⁸ No hearsay evidence was admitted. Later Talmudic law, however, allowed a document signed by two witnesses to be accepted in place of oral testimony, if circumstances demand it.³⁹ The testimony had to be deposited in the presence of the defendant. Exception to this rule was made when the witness or the defendant were sick on their deathbed; when the witness was obliged to depart on a long journey and the defendant delayed his arrival, when the defendant was abroad or in any distant land.⁴⁰ If the defendant was summoned to court several times and refused to come, testimony was accepted in his absence.⁴¹ No testimony is deposited at night.⁴² But if it has already been deposited the testimony is valid.⁴³ The witnesses deposit their testimony standing, while the judges are sitting.⁴⁴

Before the witnesses deposited their testimony, an admonition

³³ San. 24b, 25b; Tosephta 5, 3.

³⁴ See *infra*.

³⁵ B. B. 43a.

³⁶ Maccoth 23a; Tosephta San. 5, 3.

³⁷ Ketuboth 21a.

³⁸ Maccoth 6a.

³⁹ Maim. H. Eduth 3, 4.

⁴⁰ B. K. 112b.

⁴¹ I. c.

⁴² San. 34b; Yebam. 104b.

⁴³ Jer. San. 4, 5; See also Rashbam to B. B. 113a.

⁴⁴ Sheb. 31a.

was administered to them to tell the truth, and give all information they possessed. This was done publicly; afterwards everybody⁴⁶ was asked to leave court and the examination began. They were examined one by one.⁴⁷ The examination in civil cases consisted of main points and secondary ones. The main points were time and place. There were six questions in regard to time; seven year cycle, year, month, day of the month, day of the week, and hour of the day, and one question as regards the place. The secondary points were those not bearing directly upon the case, as the kind of coin, and other circumstances. If there were any contradictions between the witnesses whether in the main or secondary points, the testimony was nullified. "Said one on examination, 'I do not know'; if it was in regard to main points, the testimony became invalid." Lack of knowledge in regard to secondary points did not invalidate the testimony.⁴⁸ If the contradiction in time was insignificant in regard to the day of the month (an error in one day), where the mistake was excusable the testimony was valid.⁴⁹ This examination, however, was in later Talmudic Law relinquished for minor civil cases, where the subject involved was only money. It was deemed necessary to do so for the sake of not putting too many difficulties in the way of collecting debts.⁵⁰ In other cases, such as injuries and robberies, this examination formed a necessary part of the proceedings.⁵¹ However, even later, if the case sounded suspicious to the judge, a cross-examination was deemed necessary.⁵² After the witnesses were heard singly, they were put face to face and were made to repeat the testimony.⁵³

The testimony of the witnesses could be heard on different days.⁵⁴ This must not be taken simultaneously, but if one after

⁴⁶This is not quite clear. It depends on the reading in the Mishna San. 29a in Bab. and in Jer.

⁴⁷San. 29a; Mishna Jer. San. 3, 5.

⁴⁸San. 40a.

⁴⁹It goes back to the Ibbur Hahodeash.

⁵⁰San. 32a-b.

⁵¹San. 32a; Maim. H. Eduth 7.

⁵²Jer. San. 3, 8.

⁵³Tosephta.

⁵⁴San. 30a.

another is still valid.⁵⁵ In all cases, however, the testimony must be a thorough one and cover the whole case. No half testimony is valid.⁵⁶ Two witnesses had the same legal power as a hundred,⁵⁷ so that in case of contradiction only testimony against testimony was considered and not number. Had the witnesses deposited their testimony before court their statements could not be retracted.⁵⁸ Interpretation, however, was possible if there was a misunderstanding on the part of the witnesses,⁵⁹ and good ground for the judge to believe that such a misunderstanding took place.

DENIAL OF TESTIMONY AND CONTRADICTION OF WITNESSES

When a set of witnesses were contradicted by another set of witnesses, the consequences were divided into two classes: (1) Contradictio in rem, (2) Contradictio in personam. The first class included all kinds of denial, whether as to falsity of testimony, namely whether the act occurred or not, or that one of the parties was away at the time the testimony is concerned with. In all such cases the testimony was nullified and the first witnesses were let go free.⁶⁰ The second class includes all denials, where the second set testifies that the first set of witnesses at the time the action took place, were alibi. In a case of contradiction of this kind, the punishment of the false witness followed, according to the *jus talionis*. They were supposed to undergo the same punishment which they had planned for the defendant, should he have been convicted by their testimony.⁶¹

DOCUMENTARY EVIDENCE

Documents as evidence are a very early institution in Jewish law. The first traces we find in Jeremiah, where a formal bill of sale was signed by two witnesses. The name given to them—*shtar*—which is an Aramaic equivalent to the word *Sefer*, and means etymologically writing, covers all kinds of bills. Here we are con-

⁵⁵San. 30a; Maim. H. Eduth 4, 2.

⁵⁶B. K. 70b.

⁵⁷Macoth 5b.

⁵⁸Ketuboth 7b.

⁵⁹B. M. 28b.

⁶⁰Macoth 5a; Tosephta Mac. 1, 1; B. K. 73a.

⁶¹Deut. xxii, 21.

cerned primarily with loan records. There are two kinds of such notes, those signed by the borrower in his own hand-writing or by two witnesses. Such a document must be written in the presence of the debtor.⁶² A bill of sale, however, could be written by the seller without the knowledge of the buyer, since he (the seller) announced that he had received the price.⁶³ All other kinds of documents must be written with the consent and knowledge of both parties.⁶⁴

The document must contain the date, place and names of the parties. "The date is incorrect, *e. g.*, if it is ante-dated, the document is invalid; if post-dated, valid."⁶⁵ Should the name of the creditor be omitted, the document is valid. The document must contain a summary at the end.⁶⁶ At the end of the summary, the witnesses append their testimony. It must not be too far away from the body of the document, not more than one line.⁶⁷ The language of the document must be clear. Should there be any ambiguity in style the debtor is given the benefit of the doubt.

A note signed by witnesses had a higher legal status than the one signed by the defendant. In the latter case the status of the loan was considered oral.⁶⁸ In the former, it was called a documentary loan. The fact of having witnesses gives to the document publicity, so that it is entitled to greater exaction powers. If the document is signed by two witnesses, and their signature is known to be authentic, the arguments of "false" or "paid" are not valid, and the note is admitted as evidence, entitling the holder to a judgment over property transferred by the debtor after the date of the document.⁶⁹ In order that the document should have full legal power, it must be certified by three judges.⁷¹ There are five ways by means of which a document may be certified: if the judges know the signature,⁷² if the witnesses signed in the presence

⁶² B. B. 175a.

⁶³ B. B. 167b.

⁶⁴ L. c.

⁶⁵ San. 33a.

⁶⁶ B. B. 161.

⁶⁷ L. c. 162.

⁶⁸ B. B. 175.

⁶⁹ B. B. 70b.

⁷⁰ B. B. 40a.

⁷¹ Ketuboth 21b.

of the judges, by testimony of two other witnesses, by their own testimony,⁷³ and by comparing the hand-writing with another document signed by the same witnesses and certified, or with signatures on two documents not contested, though not certified.⁷⁴ If the witnesses in recognizing their signatures said that they were forced or that the signature was appended under such circumstances which make testimony unqualified they are trusted,⁷⁵ but if their signature is attested by other documents, their testimony is not accepted, the reason being that, since the signature is certified, their testimony is deposited and accepted, and no one can retract his statement; but in the first case the signature assumes validity only through them, and they invalidate it simultaneously.

OATH

The Jewish oath is a kind of corroboration of the arguments. It was resorted to in cases where no regular witness or documentary evidence was to be had, and the decision had to be given on the basis of the arguments of the parties. The strength of the oath lay in its religious importance. To swear falsely was considered a grave sin, and not to bear God's name in vain is one of the Ten Commandments. Some forms of it are punishable by flagellation,⁷⁷ but this legal oath in spite of its severity was unpunishable.

There are principally two kinds of oaths: the Biblical and the Rabbinic. A Biblical oath is either primary or secondary. A primary oath is one taken in a case where the law prescribes it; a secondary oath is an oath taken by the defendant, who because he is obliged to swear in another suit by the same plaintiff, also takes his oath in the other case where the law does not require it. Rabbinic oaths are subdivided into (a) Mishnaic, and (b) later Rabbinic.

The circumstances under which the Bible prescribes an oath are peculiar to the business transactions of an agricultural community. It is primarily an oath of *pikkadon*, an oath to be taken by one who has been given an article in trust when complications

⁷³ L. c. 18b.

⁷⁴ L. c. 21a.

⁷⁵ L. c. 18b.

⁷⁷ Shevuoth 21a-29b Mishna. B. M. 6a.

have arisen from the charge.⁷⁸ However, quite in early times,⁷⁹ the literal interpretation was abandoned, and the oath was extended to include loans only under the proper conditions deduced from that passage.⁸⁰ The rule laid down by Talmudic law in regard to taking a primary or Biblical oath is, that it is to be taken by the one who by swearing is discharged from paying the claim demanded from him, i. e., the defendant.⁸¹ The language of the Scripture, regarding the oath as an equivalent for payment, points to that rule.⁸² This Biblical oath is imposed under four conditions, (a) if there is partial confession,⁸³ (b) if there is one witness testifying to the effect, that the plaintiff's claim is justified,⁸⁴ (c) if one who is entrusted with an article denies the fact or advances any other claim to the effect of shirking his responsibility in regard to the integrity of the article, according to the various degrees of responsibility, (d) if the defendant denies the claim wholly but witnesses corroborate it partially.⁸⁵ The first two cases refer to loans only and are subject to various limitations. An oath is imposed only if the plaintiff presses his claim with certainty.⁸⁶ The partial confession must come as an answer to the demand of the plaintiff, not spontaneously.⁸⁷ It must be of the same sort as the claim.⁸⁸ The amount demanded must be not less than two *main* and one *peruta*, so that the denial should be not less than two *main*⁸⁹ and the amount of confession not less than a *peruta*. If the claim was not money, but vessels, the rule prescribed was that there had to be two; their value, however, was immaterial,

⁷⁸ Exodus xxii, 9.

⁷⁹ As early as the time of Hillel, we find Shammai and Hillel differing in regard to the amount necessary for the imposition of an oath. Jer. Kiddushin 11.2; Shebuoth 6.1.

⁸⁰ B. K. 107a.

⁸¹ Shebuoth 44b.

⁸² Shebuoth 45b; Tosephta ad locum.

⁸³ Shebuoth 38b.

⁸⁴ Ibid. 40a.

⁸⁵ B. M. 3a.

⁸⁶ Shebuoth 38b-40b.

⁸⁷ Ibid. 40b.

⁸⁸ Ibid. 38b.

⁸⁹ I. e. There was in early Jewish Law a difference of opinion in regard to that; the last named sum came to be regarded as accepted.

provided they were worth not less than two perutas, one each.⁹⁰ In case the oath was imposed by the testimony of one witness, this limitation of amount was removed. The amount in question might be as small as possible, but not less than a peruta.⁹¹ One can also bring about an oath even if the claim of the plaintiff is doubtful.⁹²

In regard to the oath taken by a trustee, there is a distinction to be made whether he denies entirely his charge and responsibility; in this case the trustee falls under the category of *tannah*, and a partial confession will be required with the same amount of money prescribed by law. But if the keeper admits his being so, but advances arguments of accident such as fall beyond the limits of responsibility, there is no partial confession necessary.⁹³ In case of a partial confession, if while he confesses he offers the amount conceded, no oath can be imposed according to later Talmudic law.⁹⁴ All Biblical oaths are imposed only if the thing claimed is definite.⁹⁵ A Biblical oath is imposed only when the thing claimed is movable, and has real value.⁹⁶

In later Talmudic law, the possibility of incurring an oath through another case was introduced. It happened in the following manner. If A was the defendant in two cases, in one of which according to prescribed rules he was obliged to take an oath, the claimant might urge that A should also swear in the other case. This is of Mishnaic origin,⁹⁷ but it seems to be of a very late date, for the Amoraim still look for its Biblical source.⁹⁸ When an oath is incurred, all limitations are removed. Even immovable property, notes or slaves or even a doubtful claim, can necessitate an oath through *gilgul*.

⁹⁰ Jer. Shebuoth 6, 1. There is a different view in the Bah.

⁹¹ It is to be remarked that the Mishna hardly knows of the power of testimony of one witness. The only Tannaitic source for it is an anonymous baraita quoted in B. Sheb. 40a.

⁹² It is to be inferred from the generality of the language of the baraita saying that, wherever two witnesses bring about the exaction of money, one brings about an oath. The power of two is not limited, whether the claim of the plaintiff is certain or doubtful.

⁹³ Sheb. 43a.

⁹⁴ B. M. 4a.

⁹⁵ Mechilta Mishpatim 15.

⁹⁶ Sheb. 42b.

⁹⁷ Kiddushin 27a; Sifri 1, 15.

⁹⁸ I. e.

The Mishnaic oath was an oath imposed upon the plaintiff, the aim of which was the awarding of the sum or article in question to the plaintiff.⁹⁹ It was an old institution and imposed under such circumstances where the real defensive oath could not be taken. It was administered to the hired laborer, the robbed or injured, the storekeeper when his credit book showed the sum borrowed, and in cases where the defendant was suspected.¹⁰⁰ In all these instances the underlying principle was, as remarked, that the defendant upon whom the oath lies originally could not with full conscientiousness take it.

There are several more cases when a Mishnaic oath is imposed. If one produces a note against another, and he admits that part of it is paid, then he ought to swear before he collects the rest.¹⁰¹ An oath was also imposed on executors of estates, partners, laborers, who share in the products of the fields, *Arissim*, and all managers of estates of minors. The oath is imposed even in an uncertain claim, a mere suspicion, but yet the amount suspected must be the legal one—two *main*, but no confession is necessary.¹⁰² If the executor was named by the testator he could not be brought to swear.¹⁰³ In addition to those two kinds of oaths later Talmudic law knows of a Rabbinical oath called *Heseth*. The time of its establishment seems to be during the second generation of Amoraim. R. Nachman was its founder.¹⁰⁴ It was imposed in all cases where a Biblical oath could not be imposed, as, for instance, complete denial or "I do not know." Even in this case, the plaintiff had to be certain in his demand.

ADMINISTRATION OF OATH

The Biblical and Mishnaic oaths were given while the judge held the book of the law or any other holy article.¹⁰⁵ The form of the oath contained the name of God or a surname.¹⁰⁶ A *Heseth*

⁹⁹ Sheb. 44b; Tosephta ad locum; Mechilta Mishpatim.

¹⁰⁰ l. c.

¹⁰¹ l. c.

¹⁰² Sheb. 48b; Maim. H. Shutfin 9, 2.

¹⁰³ Gittin 52a.

¹⁰⁴ Sheb. 40b.

¹⁰⁵ Sheb. 38b.

¹⁰⁶ Shaari Shebuoth 3; Maim. H. Sh. 9, 8.

oath was not administered with a holy article, but the name of God was mentioned.¹⁰⁷ The Biblical and the Mishnaic oath could be given in any language. It is of necessity, that the one who takes it should understand its meaning. Admonition was administered before any Biblical or Mishnaic oath was given, but not before a *Heseth*.¹⁰⁸

A Biblical and Mishnaic oath could not be turned over to the plaintiff if the defendant demanded it, unless he was a suspect, but a Rabbinical oath could.¹⁰⁹ If the defendant refuses to swear and pay, in a case where a Biblical oath is involved, court passes judgment and executes the sentence; but if it is a Rabbinic oath he is put under ban only. In case the defendant is suspected in a Biblical oath, it is turned over to the plaintiff, but not in a Rabbinic oath including the Mishnaic.¹¹⁰

If the defendant cannot swear, whether on account of uncertainty or any other reason and the plaintiff cannot take it over, the general principle in Biblical oaths is that if one is obliged to take an oath and cannot do so, he must pay.¹¹¹ In a case of *Heseth*, if it is uncertain, he swears that he does not know.¹¹² In a Mishnaic oath the one who refuses to swear is merely banned. In order to avoid any deceit on the part of any one taking the oath, he was warned before he was given the oath not to swear on what is in his own mind but on what court thinks as put forth in the claim.¹¹³ Perjury, though not punished, was considered a most horrible sin.¹¹⁴

Criminal

WITNESS EVIDENCE

The only evidence effective in capital cases that Jewish law took cognizance of is witness evidence.¹ The act must be seen by

¹⁰⁷ Maim. l. c. 13; Sh. Sheb. l. c.

¹⁰⁸ Inferred from the language of an old Baraita Sheb. 39a.

¹⁰⁹ Shebuoth 41a.

¹¹⁰ l. c.; Maim. T. Venitan 2, 6.

¹¹¹ Sheb. 32b; 47a.

¹¹² B. K. 118a.

¹¹³ Tosephta Sota 7.

¹¹⁴ Philo in his *de specialibus legibus* 11, 2-35, goes to the extreme.

¹ San. 37b.

both witnesses simultaneously, and they must see each other.² The judges could not convict any one in capital cases³ on the strength of their own testimony.

QUALIFICATION AND DISQUALIFICATION OF WITNESSES

Every adult Jew of the male sex, of religious and moral integrity, not related to the accused nor to the judge, could be a witness in a capital crime. All those disqualified for civil cases were the more disqualified for capital. The general principle is, that he who is qualified to be a judge is also qualified to testify.⁴ This principle, however, is not exclusive, and a number of exceptions were allowed. In fact, it is only theoretical, for, in practice, judges of the higher tribunal were of noble descent,⁵ while it was of course no necessity that the witnesses should produce a certificate of descent.⁶

EXAMINATION OF WITNESSES

Witnesses in capital cases were subjected to the strictest and severest examination. A strong admonition to the witnesses was pronounced. They were threatened and warned that the blood of the accused would rest upon them and upon their children.⁷ They were asked to consider whether perhaps their evidence is hearsay or circumstantial. If they still persisted, the court proceeded to examine them. The examination was conducted in public in the presence of the

² Only for capital punishment. For another kind of punishment see *infra*. Macoth 6b.

³ Macoth Tosephtha 2, 1; Macoth 12a; B. K. 90a.

⁴ Nidda 49b.

⁵ San. 32a.

⁶ The view quoted in the text is the one adopted in Talmudic law. See Maim. H. Eduth 10, 4. There is, however, another view expressed in the Talmud, which considers men disqualified in civil cases on account of greed or of any transgression which can be explained as a motive, as qualified in capital cases. The psychological basis of this view is, that the man may be greedy but not generally dishonest, and when it comes to capital punishment he would not by any means testify falsely. See San. 27a, Tosephtha Macoth 1, 4. It is the view of R. Jose, a man of very high authority. But it seems that the majority of Talmudic jurists did not countenance this view. See Jer. San. 3, 4.

⁷ San. 37a.

accused,⁸ and in the presence of the whole court. The witnesses were examined singly.⁹ This process of examining the witnesses singly is very old. It has been used by the wise man in the story of Susana to detect the plot of the two elders against Susana.¹⁰

Court tried by various devices to confuse the witnesses by questioning them unsystematically, passing rapidly from one subject to another subject in disorder.^{11, 12} The examination consisted as above¹³ of seven primary points, *hakiroth*, and a great number of secondary ones, *bedikoth*; of the seven primary ones, a number related to time and one to place, two related respectively to the person and to the warning. If it was a religious crime, two more questions were asked relating to the nature of the crime and manner; as in case of idolatry, the name of the idol and the form of worship were important.¹⁴ The secondary points related to such things which were not directly connected with the crime, as in case of murder, the kind of clothes the murdered wore, particularities of the spot where the murder was committed.¹⁵ The difference between primary and secondary questions was this: if in answer to a primary question one of the witnesses says, I do not know, the testimony becomes invalid; while in secondary questions, mere ignorance does not nullify the testimony. Contradiction in both cases invalidates the testimony.¹⁶

No one could be exempted from examination; even if the witnesses came and said that the crime was committed that very day, they were still subjected to examination.¹⁷ After the witnesses have deposited their testimony, they cannot contradict it even if they offer certain reasons for doing so.¹⁸ No interpretation was allowed.¹⁹

⁸ Sifri 11, 190.

⁹ See Mishna San. 29a.

¹⁰ See Susana V. 56.

¹¹ San. 32b; Maim. H. Eduth 1, 4.

¹² This is the view of Maim., who interprets the words "Masim mimokom lemokom" in a metaphorical sense, from one subject to another.

¹³ Cf. *supra* Chap. 4.

¹⁴ San. 40a.

¹⁵ I. c.

¹⁶ Jer. San. 5, 1.

¹⁷ Sifri 11, 190; San. 44b.

¹⁸ Macoth 6b.

THE DISPROVAL AND ALIBI, CONFUTATION OF WITNESSES

Witnesses may be either disproved in rem or confuted in personam. In the first case, it is a simple denial of the testimony. Either the fact that the act took place is denied, or that the persons that took part in it are not the same as the first set of witnesses wanted to prove. When such a disproof occurs, if the denying set fulfils the requirements for witness qualification, the testimony is annulled, but the confuted set goes free.^{19, 20} The second case is an alibi, that is, the witnesses are proven by the second set to have been in a different place at the time the act was committed. This kind of confutation, Hazomoh, was punishable by court.²¹ The principle of punishment was that of retaliation, the punishment being that which would have been imposed upon the defendant as a result of their testimony. In accordance with the basis of this principle of punishment, which is that the false witnesses are punished for their evil intention which might have become realized, the punishment was inflicted upon them only if they had been refuted by an alibi, after the verdict had been given.²² The same principle underlies probably the rule that false witnesses were punished only when both had been proven alibi, but if only one had been so proven he was not punished.²³ In this case the intention of that one witness was not about to be realized. If the confutation occurred after the execution had taken place no punishment followed and the witnesses were set free.²⁴

CONDITIONS OF CONFUTATION

Witnesses are disproved or confuted if another set of witnesses deny their testimony or prove them to have been alibi. If two parties of witnesses disprove each other, their testimony is rejected, and though they may be qualified for themselves, they

¹⁹ For details see above Chap. 4.

²⁰ There is a later view in the Talmud.

²¹ Macoth 6b.

²² I. c. 5b.

²³ Mechilta 20; Macoth 5b.

²⁴ I. c. This question depends upon the explanation of the story of Susana V. 62.

cannot appear in a combination.²⁵ Alibi proven witnesses are debarred from appearing as witnesses in any future case.²⁶ Also all evidence given by them since their participation in this case, even that which was given before confutation, is invalidated.²⁷ Witnesses are not subject to the penalty of confutation, unless all of them are proven alibi.

The number of confuting witnesses does not matter. Two witnesses are the legal unit for testimony, and their power is as extensive as if there were many. Therefore, whether there were in the first party two witnesses or one hundred, a second set consisting of only two may confute them.²⁸ As these witnesses are punished for the evil intention of destroying a life, and the principle of punishment is life for life, therefore, it is not right that the life of a healthy man should be taken away for the intent to kill a sick man. If it has been proven that the accused has been sick to such a degree that he could not live longer than a year, they are unpunished.²⁹

EVIDENCE NOT DULY SATISFACTORY

The rules prescribed for legal evidence necessary for conviction by court were, as we have seen, very rigid, and consequently, some rules had to be enacted for crimes committed for which there was proof, but insufficient proof according to law. There was another kind of punishment called Kippo, prison, the aim of which was to do away slowly with the criminal. If no warning could be given, or the witnesses saw the crime singly, no death verdict could be reached, but a prison sentence was imposed.³⁰ Circumstantial evidence, if very convincing, was also followed by the same punishment.³¹

²⁵ Sheb. 37b; B. B. 31b.

²⁶ Tosephta Macoth 2, 1.

²⁷ San. 27b.

²⁸ Macoth 5b.

²⁹ San. 78a.

³⁰ San. 81b, Maim. H. Rotzeah 4, 8.

³¹ Jer. San. 9, 5.

CHAPTER V

JUDGMENT AND VERDICT

Civil

JUDGMENT

When the giving of evidence had been concluded, the court discussions began.¹ There was a summary of arguments, and statements of the evidence were read.² If there was a difference of opinion, a majority of one decided. If one hesitated or wavered, judges were added.³ The maximum number was seventy-one even in civil cases,⁴ if necessary. If after the number was increased to the maximum no decision could still be reached, the money was left in the possession of the one who had it at the time.⁵ In certain cases (civil) where the judges could not reach any conclusions based on evidence, they had a right to decide on circumstantial evidence according to their personal opinions.⁶ There were, however, some other minor principles of evidence as presumption, majority, and Miggo, which enabled the judges to decide a case where direct evidence was lacking. When the vote was taken the president of the court announced the judgment.⁷ If the judgment was unanimous, it was not written unless one of the parties demanded it,⁸ but if there was a controversy the judgment was written down. If the successful party demanded a written judgment, he could obtain it only while both parties were in court. After that the consent of the loser had to be obtained.⁹

¹ San. 30a.

² Jer. San. 2, 8.

³ l. c. San. 29a.

⁴ Tosephta San. 6; Maim. H. San. 8, 9.

⁵ Maim. l. c. Inferred from the usual legal maxim, "Let the money remain where it is."

⁶ Kethuboth 85b.

⁷ San. 29a.

⁸ Ch. M. 19, 2.

⁹ B. B. 17a.

APPEAL AND REVERSAL

There was no regular institution of appeal, yet the party concerned could appeal to a higher court, or to a court whose members were noted for greater scholarship.¹⁰ However, there was no stay of judgment while the appeal was proceeding. The effects of the decision had to be carried out,¹¹ and if a reversal occurred, the things were returned.¹² A reversal occurred either on a statement of admitted facts but some error in the interpretation of the law, or on the basis of new evidence. In the first case if the error was an open one, Mishna, the judgment was reversed immediately.¹³ If the error consisted in a matter of logical interpretation, Shikul hadaath, a higher court could reverse the judgment only when the latter court was recognized as superior in knowledge as well as in numbers. In the second case whenever new evidence was brought, or any other thing that might put the trial in a new light was brought up, the decision was reversed by the same court or any other one. Even if the court set a time limit in which new evidence was to be presented, and that time expired, yet the right of the party concerned was not invalidated, and a revision could be brought about after the appointed time.¹⁴ If he said in court: "I have no more evidence or witnesses," and later he brought other evidence, then if the new evidence is of such a nature that possibly at the time of his declaration he did not and could not know of it as, *e. g.*, if the witnesses arrived from over sea, or any other new circumstance appeared, the latter evidence is admitted, but if the case is different it is rejected.¹⁵

Criminal

VERDICT

When all preliminaries were completed, the final vote was taken. In voting, a majority of one was necessary for acquittal,

¹⁰ San. 33a.

¹¹ l. c. Ch. M. 14, 4.

¹² B. B. 3a.

¹³ San. 33a.

¹⁴ San. 31a, according to Raahbam.

¹⁵ San. 31a-b.

and a majority of two for conviction.¹ This, however, is only a theory, but in practice since the tribunal consisted of an odd number, every sentence of conviction was always passed by a majority of three.² If there are twelve for conviction and eleven for acquittal or an equal number on each side, if it is the lesser Sanhedrin they continually increase the number of judges to the maximum limit, which is seventy-one.³ When the maximum limit has been reached and still the number of necessary votes has not been obtained, the argument goes on between the two parties till one of those who stands for conviction changes his opinion.⁴ If the parties maintained their opinions and no conclusion could be reached, then the accused is discharged.⁵

In counting the votes the personality of the voter is not the unit of counting, but the originality of the arguments he advances. Should two men advance the same argument, their vote is counted as one.⁶ If the verdict has been unanimous for conviction the accused is discharged.⁷

REVERSAL AND APPEAL

A verdict of acquittal could never be reversed, but a verdict of conviction could.⁸ After conviction a man was stationed at the court door with a flag in his hand, while a rider was stationed at a distance. As soon as any new evidence was presented, the flagman gave the signal and the rider hastened to stop the execution.⁹ A crier went in advance of the procession and announced: this culprit is led to the scaffold for such and such a crime, such and such men are his witnesses; any one who knows some facts in his favor let him come to court and testify.¹⁰ If any evidence was brought, the convicted man was immediately brought back and his trial reopened.

¹ San. 32a.

² See *supra* Chap. 3 for more particulars.

³ San. 40a.

⁴ *L. c.*

⁵ San. 43a.

⁶ San. 36a.

⁷ San. 17a, saying of R. Kahana.

⁸ San. 32a.

⁹ San. 42b.

¹⁰ *L. c.* 42b & 43a. *Tosephta* 9, 3.

Even he himself had a right to say, "I have some new evidence in my favor," whereupon he was brought back. The first two times he was taken back on his mere statement, after that he had to give some reason. In order to save time and futile impediments, two court members accompanied him and listened to his arguments, and if they thought them worthy he was returned as many times as necessary.¹¹

If a convicted person escaped from court and later was brought back, no reversal followed, but if he was convicted by a tribunal outside of Palestine and thence escaped to Palestine, the court there had a right to reverse his trial.¹²

¹¹ *Macoth* 7a; *Jer.* 1. There is a reading in the old editions of the Talmud stating that at the conviction of Jesus an announcement of it was issued forty days before the execution. However, the Talmud itself considers the statement doubtful on the ground of his being a persuader to idolatry, in regard to whom all laws of mercy were suspended. However, even from the records that we possess, the thing seems incredible. The Evangelical report tells us that his trial and execution followed each other immediately. (It seems from Matthew that the trial and the execution were on the first day of Passover, a day on which no capital trial could be held according to Talmudic law. This trial therefore cannot teach us much about Jewish procedure.) Besides, this length of time, forty days between the trial and the execution, is against the principles of Jewish law, not to delay the execution. It is, therefore, an untrustworthy tradition.

¹² *Macoth* 7a.

CHAPTER VI

EXECUTION

Civil

Thirty days were given to the losing party for purposes of obtaining money to pay the claim.¹ No pledge was demanded nor could he be put to an oath.² If he had personal property (*mobili*) no time was given, but the judgment was immediately executed. If the debtor claimed that the note of the creditor was false and that he could prove this if sufficient time were allowed him, an extension of time was granted.³ If the time expired and he did not appear or he did not bring witnesses, the court waited for three court days (which were usually on Monday and Thursday), and then he was placed under the ban. Moreover, an extension of ninety days was given him, at the end of which, if no payment was made, an execution writ was given.⁴ This exceptional extension was granted only in case of a loan where there was reason to believe that the debtor was looking to raise money, even to sell his property for that purpose. But if the claim in question was a trust, no time was given, but the document was written immediately.⁵ When the document has been written we inform him and wait a few days till informations will reach him. If the creditor be a violent man and if he will collect the money it will be too difficult to get it out from him should the note be proven false, court waits even a year with the execution writ till the debtor is informed.⁶ If the debtor has personal property only, no *adrachta* is written,⁷ but as a way out of the difficulty the money is deposited with court.

FORM OF EXECUTION

When the execution writ was given out, the original note was

¹ B. M. 118a.

² Ch. M. 100, 1; Maim. H. M. Velove 2.

³ B. K. 112b.

⁴ l. c.

⁵ l. c.

⁶ l. c.

⁷ l. c. 112b; Moed K. 16a.

taken away.⁸ After the order of execution was written and the creditor located the property of the debtor, the former pointed it out to the court, which appointed three of its members to estimate the property.⁹ After this the public proclamation was issued. The order was proclaimed by the court crier for thirty days in succession, both in the morning and in the evening, stating the boundaries and price of the property.¹⁰ The property was sold to the highest bidder. The creditor was paid from the money and the buyer received a deed. If the creditor himself took the property, a document stating the price of the property at the time, and the amount of the debt was given him instead of the execution order. This served him instead of a deed.¹¹

If the property was sold or mortgaged to anybody else, the creditor could take it away provided the latter's right to the property was of a later date than his loan. In this case a second document was given to the creditor after he had located the property. This second document, called *Torpha*, stated the claim of the creditor and ordered the owner to yield the property to the creditor.¹² The creditor had to take an oath.¹³ The owner had an option, either to pay the debt or surrender the property.¹⁴ In case of the owner turning over his property, a document stating both the amount estimated and the debt was given to him with which he in turn became the creditor of the seller with all the rights appertaining to it.¹⁵ Execution could be performed in the absence of the debtor only in case the latter could not be notified because of the distance.¹⁶ However, he had to take an oath.¹⁷ In some cases the debtor was sent three letters. If he answered, his arrival was waited for; if not, the execution proceeded.¹⁸

⁸ B. B. 169a.

⁹ B. B. 107a.

¹⁰ Eruchin 21a.

¹¹ B. B. 169b.

¹² B. B. 169a.

¹³ Kethuboth 87a.

¹⁴ B. M. 16a.

¹⁵ Kethuboth 91b.

¹⁶ Ashri, Kethuboth ad 9; Kethu. 88a.

¹⁷ l. c. 87a.

¹⁸ Jer. ad locum.

PERSONAL PROPERTY

In case the debtor had no real property, his personal properties were attached. If the household property was sold by the court, a certain minimum amount was left to the debtor, food for thirty days, the most necessary things for living, as a bed, mattress, cover, a suit of clothes adapted to his economic condition at the time, and some other things.¹⁰ If the debtor had cash it was taken from him by court and given to the creditor. If he had notes on other people, the court took them and collected the money. This is generally known as the principle of R. Nathan.

CRIMINAL EXECUTION

When no impediment happened, the execution procession went on its march. A few paces from the scaffold, the convicted was urged to confess and pray.¹ Afterwards his relatives and friends were admitted to see him.² Immediately after the parting of the relatives, the convicted was given a kind of intoxicating drink in order that he should not suffer agony.³

The Bible prescribes three kinds of death punishment, by stoning, by burning, and by the sword. The Talmudic tradition, in a very old Mishna⁴ tells us that there were four kinds, the three referred to above and strangling. Josephus does not mention strangling either. Strangling seems to have been a most general punishment in spite of its being ignored by the Bible. The Talmud lays down a general rule that where the mode of punishment is not mentioned, strangulation is meant.⁵ The reason is that it has been considered the least painful, and so the culprits have been given the benefit of the silence of the law.⁶ As regards death by sword, there are only two cases mentioned; one is stated explicitly in the Bible, and is a religious crime, the case of a whole city being condemned for idolatry; the second is homi-

¹⁰ Eruchin 23b.

¹ San. 43b; Tosephta 9, 5.

² Abel Rabathi 2, 3.

³ I. c. San. 43a.

⁴ San. 50b.

⁵ San. 52b; Jer. 7, 1.

⁶ I. c.

cide. The punishment for the latter is not stated explicitly in the Bible, but traditional law through the Talmud ascribes it the same kind of death.⁷ This is an interesting fact, for it shows how a certain legal custom comes down through the generations, and later scholars try to find reasons for it. The Talmud in citing the case and attempting to state the reason, deduces it by a hermeneutic analogy, on the verse Exod. xxi, 20, which speaks of killing a slave, while the previous verse, which would rather point to strangulation, is left out. It is true that the Talmud notices the difficulty and attempts to deduce it in another way. But the least critical can detect that the reasoning is forced. The truth is that homicide was punished with the sword by all nations of antiquity.

⁷ San. 76b.

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**END OF
TITLE**